Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 318

STATE CINEMA OF PITTSFIELD, INC.
PETITIONER,

v.

MATTHEW J. RYAN, JR., Esquire,
WILLIAM J. FLYNN, Esquire, and MILO BROWN,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. QUINN,
Attorney General,
JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Division,
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District Attorney,
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Opinions Below

The opinion of the court below (Pet. App. A) is not yet reported. The opinion of the district court (Pet. App. B) is reported at 303 F. Supp. 579.

Jurisdiction

The judgment of the court below was entered on March 27, 1970. The petition for a writ of certiorari was filed on June 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

Whether the district court properly dismissed the complaint seeking to enjoin state law enforcement officers from threatening to enforce an alleged violation of the Massachusetts obscenity statute (Mass. Laws, ch. 272, 28A).

Statement

Petitioner filed a complaint in the United States District Court for the District of Massachusetts under provisions of the Civil Rights Act (42 U.S.C. 1983) seeking to enjoin respondents—Matthew J. Ryan, Jr., Esquire, District Attorney for the Western District of Massachusetts, William J. Flynn, Jr., Assistant District Attorney for the Western District of Massachusetts, and Milo Brown, a Massachusetts State Police Officer—from threatening to prosecute exhibition of the film, "Vixen", and from seizing that film. On September 12, 1969, the district court, after a hearing, ordered the complaint dismissed (R.8).[1]

Petitioner alleged the following facts in his complaint. On or about September 4, 1969, petitioner—a corporation incorporated under the laws of the Commonwealth of Massachusetts, and in the business of exhibiting motion pictures—exhibited a motion picture entitled "Vixen" at

[1] References ("R") are to the Record Appendix filed in the court below and which, upon information and belief, has been filed with the Clerk of this Court.

the Showcase Cinema in Pittsfield, Massachusetts. On the same day, respondents ordered petitioner not to exhibit the film, and stated that they would arrest and prosecute the petitioner and the agent in charge of the Showcase Cinema, and seize the film, if exhibition continued. As a result of this alleged order and threat, petitioner discontinued exhibition of the film (R.2-3).

Argument

At the outset, it must be emphasized that petitioner asks this Court to review the judgment of the court below on the basis of facts not alleged or brought to the attention of that court, or to the district court. In both courts below, petitioner specifically and unequivocally disclaimed bad faith on the part of the respondents. In both courts below, petitioner specifically and unequivocally disclaimed any challenge to the constitutionality of the Massachusetts obscenity statute (Mass. Gen. Laws, ch. 272, §28A). In spite of these disclaimers, however, petitioner now attempts to inject an element of bad faith on the part of respondents, and a challenge to the constitutionality of the statute. Thus, petitioner suggests that respondents "clandestinely and secretly" threatened to suppress the showing of the film (Pet. 7, 12). Not only is that assertion wholly contrary to fact, but no such allegation or proof was made to either court below. In another oblique attempt to suggest bad faith on the part of the respondents, petitioner suggests that the film, "Vixen", enjoys widespread distribution throughout the United States (Pet. 2). Again, however, no such allegation or proof was made in either court below. Petitioner further alleges here that the respondents threatened to seize the film *in the absence of a prior adversary hearing* (Pet. 8-9). But no such allegation or proof was made in either court below. Finally,

petitioner now challenges the constitutionality of the Massachusetts obscenity statute (Mass. Gen. Laws, ch. 272, 28A) in light of this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557 (Pet. 11-12). But, as mentioned above, petitioner specifically disclaimed that challenge in the two courts below, well after this Court's decision in *Stanley*, and, in the court immediately below, well after the three-judge court decision in *Karalexis* v. *Byrne*, 406 F. Supp. 1363 (D. Mass. 1970), probable jurisdiction noted, *sub nom. Byrne* v. *Karalexis*, 397 U.S. 985—holding that statute "probably" unconstitutional.

In short, the *only* question before the two courts below was whether a good faith warning to invoke a valid obscenity statute against petitioner constituted a cause of action under the provisions of the Civil Rights Act (42 U.S.C. 1983).

In the circumstances, the district court properly withheld the granting of injunctive relief, and dismissed the complaint, for failure to state a cause of action in equity which would warrant the granting of injunctive relief.

In *Douglas* v. *City of Jeanette*, 319 U.S. 157, this Court unequivocally held that it is peculiarly inconsistent with our federal framework to enjoin a state's good faith administration of its criminal laws, and that injunctive relief should be granted only upon a showing of exceptional circumstances. See also, *Cameron* v. *Johnson*, 390 U.S. 611. We are unaware of any departure from this judge-made rule which is based upon general principles of comity and federalism. In *Dombrowski* v. *Pfister*, 380 U.S. 479, this Court found such exceptional circumstances and granted injunctive relief. But in that case, as later noted by this Court in *Cameron* v. *Johnson*, 390 U.S. 611, a showing was made that prosecution was threatened in "bad faith" with no hope of ultimate success at trial, and that the plaintiffs had justifiably attacked the constitutionality

of the statute under which prosecution was threatened. Neither factor, however, is present here. In this complaint, petitioner did not challenge the "good faith" administration of criminal laws by the respective respondents. Nor did he challenge the constitutionality of the statute under which prosecution would be brought (Mass. Gen. Laws. ch. 272, §28A). In these circumstances, the district court properly withheld the granting of injunctive relief. *Douglas* v. *City of Jeanette*, 319 U.S. 157; *Cameron* v. *Johnson*, 390 U.S. 611.

Nothing in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, warrants a different result. That case involved the functions of an administrative commission created to educate the public as to "objectionable" literature.[2] This Court noted that the function of that commission was wholly apart from the legitimate state interest regulating the distribution of "obscene material." On this basis, this Court found that the function of the commission was simply that of a state censor, and accordingly ruled the administrative scheme as constitutionally invalid. In so holding, however, this Court did not rule that a prosecutor, prior to the initiation of criminal proceedings for violations of state obscenity laws, could not warn the exhibitor of his violation. To the contrary, this Court specifically stated (373 U.S. at 71-72):

> In holding that the activities disclosed on this record are constitutionally proscribed, we do not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible. We do not hold that law enforcement offi-

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[2] At oral argument, the Attorney General of Rhode Island conceded that "objectionable" literature could include literature which is not obscene within the holdings of this Court. See 372 U.S. at 64.

> cers must renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity. Where such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment protections.

Nothing in the present complaint indicated that the alleged threats of prosecution were made for a purpose other than to, in good faith, secure compliance with valid obscenity laws. The district court therefore properly dismissed the complaint for failure to state a cause of action.[3]

Conclusion

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] Contrary to the suggestion of petitioner, the threat of arrest—standing alone—does not amount to a prior restraint. *Milky Way Productions, Inc.* v. *Leary*, 305 F. Supp. 288 (S.D.N.Y. 1969), affirmed ___ U.S. ___, 90 S. Ct. 817.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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The brief of respondents in opposition to the writ seems to create more misconceptions of the petitioner's argument than affirmative answers thereto. The petitioner does not argue that the respondents acted in a degree of bad faith as defined in *Cameron* v. *Johnson*, 390 U.S. 611. Indeed, it is the requirement of bad faith under the *Cameron* doctrine which the petitioner seeks to distinguish and to avoid in the present case. The issues presented here are really clear cut and straightforward.